

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument respondent conceded that the compensability of claimant's accident is no longer in dispute. The only issues for purposes of this appeal are the nature and extent of claimant's permanent impairment and whether the respondent is responsible for mileage incurred by claimant's son in traveling to and from Lawrence for the sole purpose of taking claimant to his authorized medical providers, all of which were within the Lawrence, Kansas area.

ISSUES

The ALJ granted claimant a 30 percent permanent partial impairment to the right upper extremity as well as transportation costs to and from authorized medical appointments. These transportation costs included not only the mileage to and from claimant's home but the mileage incurred by claimant's son as he traveled to and from Lenexa, Kansas in order to take his father to his medical appointments within Lawrence, Kansas.

The respondent requests review of this decision alleging the ALJ "erred in assigning an impairment rating which is contrary to all of the medical evidence in this case."¹

Claimant argues the Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Pursuant to the parties' stipulations, claimant sustained a compensable injury by virtue of his repetitive work activities involving his right upper extremity. The ultimate question is the extent of his permanent partial impairment. Two physicians spoke to this issue.

Dr. Chris Fevurly was retained by the respondent to evaluate claimant and provide treatment. Dr. Fevurly diagnosed right lateral epicondylitis and right dupuytran's tendon thickening. A protective strap was provided along with a modified work release. These restrictions were continued at the next office visit. When claimant's complaints did not improve, he was eventually referred to Dr. Neal Lintecum, who performed a lateral epicondylar release on claimant's right arm.

Then, on August 16, 2004 Dr. Fevurly saw claimant again for purposes of a permanent impairment rating. As of that date, claimant had no distal neurological symptoms such as numbness or tingling in his right arm, but he demonstrated weakness which, according to Dr. Fevurly, was caused by pain. He was also tender in the area of his lateral epicondyle.

Dr. Fevurly performed grip strength testing with a JAMAR dynamometer which revealed a significant difference in strength when comparing the left hand to the right. He

¹ Application for Review at 1 (filed July 10, 2006).

also noted a “generalized diminishment to soft touch, pin prick, and two point discrimination in all fingertips of the right hand.”²

Using the 4th edition of the *Guides*³ Dr. Fevurly rated claimant as having a 10 percent permanent partial impairment to the right elbow as a result of the unremitting right lateral epicondylar pain which has not improved following surgical decompression.⁴ Dr. Fevurly explained that because claimant’s sensory deficit in the right hand does not fit any type of peripheral nerve patterns, he had no reliable way of determining an impairment based on peripheral nerve disorders as outlined in Table 11 and 12, pages 48 and 49 of the *Guides*.⁵ And he explained that claimant’s diminished grip strength in his right hand is, according to Dr. Fevurly, caused by pain rather than a muscular or neurological deficit. “. . . thus the use of grip strength is not reliable nor is it emphasized as a technique that should be utilized in determining impairment.”⁶ Rather, he relied on Chapter 15 of the pain chapter and based upon the persistent pain along the right lateral epicondyle, he assigned a 10 percent impairment to the upper extremity.

During cross examination at his deposition, Dr. Fevurly was asked to consider the extent of claimant’s loss of grip based upon Table 31 in the *Guides*, a table that generates an impairment figure based upon the percentage of reduction in an injured individual’s grip strength. In this instance, the average manual laborer will exhibit an average of 45 kg of grip strength in the dominant hand. Claimant’s grip strength was 12.5 kg which represents a differential of 70 percent, at least in the first position of the dynamometer. The physician agreed that a 70 percent differential equates to a 30 percent permanent partial impairment under this chart of the *Guides*. But Dr. Fevurly specifically testified that this methodology of rating for an impairment is not favored, and in his view is not a valid reflection of claimant’s impairment.

The ALJ appointed Dr. Peter Bieri to conduct an independent medical examination and assign a permanent partial impairment rating. Dr. Bieri noted that since the surgery, the claimant has been essentially unable to use his right upper extremity and requires the use of a rigid wrist brace at all times. Claimant reported difficulty with any repetitive gripping or grasping.⁷

² Fevurly Depo., Ex. 2 at 1.

³ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

⁴ Fevurly Depo. Ex. 2 at 2.

⁵ *Id.*, Ex. 2 at 1.

⁶ *Id.*

⁷ Dr. Bieri’s IME Report at 3 dated June 21, 2006.

When his wrist brace was removed Dr. Bieri noted atrophy on the right when compared to the left, primarily at the thumb. Claimant's forearm measured 1.0 cm less in circumference and claimant was unable to make a complete fist, primarily because of pain and weakness involving the right thumb.

Like Dr. Fevurly, Dr. Bieri performed grip strength tests using the JAMAR dynamometer. He found a maximum grip of 12.5 kg on the dominant right side as opposed to 45.0 kg on the left, a finding that was consistent with the test results obtained by Dr. Fevurly. Dr. Bieri assigned a 23 percent permanent partial impairment to the right upper extremity due to the residual pain and weakness secondary to claimant's right lateral epicondylitis. This opinion is based upon page 54 of the *Guides*.

The ALJ concluded that neither of the opinions expressed by the physicians adequately addressed claimant's permanent impairment. Thus, he elected to "adopt[s] the calculations arrived at by claimant's counsel and Dr. Fevurly reflecting claimant's loss of grip strength during cross examination."⁸ In doing so, the physician apparently consulted Table 34, page 65 of the *Guides*, and concluded, based upon the loss of grip strength test results offered by both Drs. Bieri and Fevurly, that claimant's loss was 72.2 percent, "which equates to a 30 percent impairment".⁹ The ALJ went on to note:

While use of grip strength loss is not favored in the *Guides*, in this instance it represents the most objective and consistent measurement of claimant's functional impairment. In addition, claimant testified he had lost most of the functional use of his right hand and was unable to perform simple tasks such as picking up a coffee cup.¹⁰

Respondent maintains the ALJ's decision to assign a 30 percent permanent partial impairment rating "is based entirely upon the ALJ's interpretation of the *Guides* and is contrary to the ratings of both Dr. Fevurly and Dr. Bieri."¹¹

The Board has considered the parties' arguments as well as the evidence and finds the ALJ's Award should be modified to reflect a 23 percent permanent partial impairment as assigned by Dr. Bieri. While Dr. Fevurly may have testified about a 30 percent rating during his cross examination, he was not asked whether this was a more appropriate rating under the circumstances. And it is unclear whether the methodology suggested by claimant's counsel which led to this figure is appropriate under the mandates set forth in

⁸ ALJ Award (June 26, 2006) at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Respondent's Brief at 2 (filed Aug. 18, 2006).

the *Guides*. Thus, the Board adopts the permanent partial impairment rating offered by Dr. Bieri as its own and the Award is modified to reflect the 23 percent impairment to the right arm at the 210 week level.

As for the dispute involving the mileage to and from Lenexa, Kansas for trips claimant's son made to Lawrence in order to transport his father and interpret for him during medical treatments, the Board finds the ALJ's findings should be affirmed. K.A.R. 51-9-11 compels respondent to provide transportation to obtain medical services "to and from the home of the injured employee". That same regulation also provides that:

(b) The employer shall reimburse the worker for the reasonable cost of transportation under the following conditions:

- (1) If an injured worker does not have a vehicle or reasonable access to a vehicle of a family member living in the worker's home; or
- (2) if the worker, because of the worker's physical condition, cannot drive and must therefore hire transportation to obtain medical treatment.¹²

Here, claimant does not own a car, nor is there any evidence that anyone lives with him and could have taken him to these appointments or that he understands how to use any public transportation methods. Moreover, he has a significant language barrier that, when accompanied by his son, is bridged as his son can interpret for him.¹³ Thus, on the whole, it would appear that claimant's son's mileage to and from Lawrence, Kansas was a bargain. Otherwise, respondent would have had to arrange for transportation as well as an interpreter, no doubt all at a far more significant charge than that reflected on the itemization presented at the Regular Hearing. More importantly, claimant testified that he was told by his employer to make his own arrangements to get to the doctors appointments. Accordingly, the ALJ's findings with respect to mileage is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 26, 2006, is affirmed in part and modified in part.

The Board affirms the ALJ's findings with respect to mileage and modifies the Award to reflect a 23 percent impairment.

¹² K.A.R. 51-9-11.

¹³ Claimant is from Iraq, a fact that is documented in his medical records.

The claimant is entitled to 40.00 weeks of temporary total disability compensation at the rate of \$220.94 per week in the amount of \$8,837.60 followed by 39.10 weeks of permanent partial disability compensation, at the rate of \$220.94 per week, in the amount of \$8,638.75 for a 23 percent loss of use of the arm, making a total award of \$17,476.35.

IT IS SO ORDERED.

Dated this _____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Jack J. Hobbs, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge